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ARIZONA DEPARTMENT OF EDUCATION

In the Matter of)	ADOE/ESS 02-010
)	
--- ---- ("Student"))	IMPARTIAL DUE PROCESS
Petitioner)	HEARING DECISION AND ORDER
)	
v.)	Hearing Dates: December 10, 18, 2001
OSBORN ELEMENTARY SCHOOL)	January 7, 2002
DISTRICT ("District"))	Held at: Osborn Elementary School District
Respondent.)	1226 W. Osborn Road
_____)	Phoenix, Arizona

PARENT: --- ----

DISTRICT REPRESENTATIVE: ALICE SIMMERMAN
SPECIAL EDUCATION DIRECTOR
1226 W. OSBORN ROAD
PHOENIX, ARIZONA 85301

CARRIE STANLEY
SCHOOL PSYCHOLOGIST
1226 W. OSBORN ROAD
PHOENIX, ARIZONA 85301

An Index of Names is attached hereto for the benefit of the parties. The Index will permit the parties to identify the witnesses and other relevant persons, and will be detached before release of the Decision and Order as a public record.

In the Matter of)	ADOE/ESS 02-010
)	
--- ---- ("Student"))	INDEX OF NAMES
Petitioner)	
)	
v.)	

OSBORN ELEMENTARY SCHOOL)
 DISTRICT ("District"))
 Respondent.)
 _____)

Osborn Special Education Director	Alice Simmerman
---- (current) Special Education Teacher	--- ----
School Psychologist	--- ----
---- Regular Education Teacher	--- ----
---- Principal	--- ----
---- (previous) Special Education Teacher	--- ----
Tutor	--- ----
Speech Therapist	--- ----
Teacher aide	--- ----
Current School	-----
Mother	--- ----
Student	--- ----
Previous School	-----

I. PROCEDURAL HISTORY AND ISSUES

By letter dated and delivered to the current School on October 8, 2001, Mother requested a due process hearing on behalf of her son "Student" because she disagreed with the change of placement proposed at the October 5, 2001 IEP meeting. By a separate letter of the same date Mother stated that she requested an IEP meeting to inform the School of her intention to register he son into a private school. She

stated that she was informed that the withdrawal process does not warrant a meeting. She stated that she felt that the school has failed to provide FAPE as well as complying with procedural safeguards. [Exhibit 1]

The Student was enrolled at the current School on August 20, 2001 and placed into a regular classroom. On August 30, 2001 an IEP meeting concluded that the regular class placement with instructional aide and resource room support was appropriate.

The Mother withdrew the Student from the District on October 6, 2001 and was home schooling him at the time of the hearing, but desired to proceed with Due Process to resolution.

This Hearing Officer was appointed on October 29, 2001. [Exhibit 2]

An in-person Pre-hearing Conference was held at the District Office on November 6, 2001 at which time the parties agreed that jurisdiction is proper under IDEA, and further agreed that undersigned may serve as Hearing Officer in this matter. [Exhibit 3] The issues to be considered at the hearing were agreed to be as follows:

1) Placement. Mother believes that a new placement was proposed at the IEP meeting on October 5, 2001, without procedural safeguards. She disagrees with the proposed placement. The school states that a new placement was not proposed. The issue to be decided at the hearing is what is the proper educational placement for Student, and whether a change of placement was improperly proposed at the IEP meeting on October 5, 2001.

2) Whether an appropriate behavior plan has been developed and implemented.

3) Whether Student's current IEP is being fully and properly implemented.

4) Whether the IEP contains appropriate positive reinforcements.

The hearing was set for November 26, 2001 but had to be rescheduled to December 10, 2001 at the mother's request. The hearing continued on December 18, 2001 and concluded on January 7, 2002.

II. FINDINGS OF FACT

GENERAL BACKGROUND

1. Student is a 10-year-old male (DOB 7-4-92) who has been found eligible for special education in the category of MIMR (mild mental retardation). He was enrolled in the current School on August 20, 2001, having been enrolled at the Previous School during the prior school year as a special education student with a self-contained classroom placement. At times in the past he has been home schooled, and he is now being home schooled.

2. Student has had several educational, psychological and psychiatric evaluations in the past, including Dr. Larry ----, in March 2000 (Exb. 36 ----); Kid Assist Dr. --- ----, December 2000 (Exb. 19, 36. ---); Dr. --- ---- in July 2001 (Exb. 19, 36 ---); --- ----, from Healthsouth performed a speech/language evaluation on December 13, 2000 (Exb. 36 ---) and diagnosed moderate - severe receptive/expressive language delay and noted that his distractibility may affect his test scores.

3. The student was being home schooled at the time of Dr. --- - evaluation in March 2000. He had previously been at a Charter School where in 1997 he was found eligible for an IEP "based on a severe language impairment." He repeated kindergarten at the Charter School "where his mother reports that he had academic problems and behavior problems. He went on to complete the Fall semester of first grade, until that school closed." He recorded a FSIQ of 62 with some subtest scatter where he scored within the Low Average and Average range. Dr. ---- diagnosed ADHD, combined type; R/O Learning Disorder NOS; Borderline intellectual function; R/O Mild mental retardation. Dr. ---- specifically noted that he displayed hyperactivity and distractibility in the one-to-one testing situation despite having been given his medication prior to the assessment (Exb. 36 ---- Pg. 2, 5-6).

4. Dr. ---- determined that the child "fell near the upper limit of the Mild range of mental retardation". He found the student to have a short attention span and mildly avoidant, but was easy to re-direct. He noted that several behavioral factors and characteristics, which could have significant adverse effects of the boy's test scores (Exb 19, 36. ---- Pg. 3- 4). He specifically noted that the boy's teachers will need to be very careful in the manner in which they provide feedback on his work. He will be very sensitive to negative feedback and giving more attention to his errors (Exb. 19, 36. ---- Pg. 8).

5. Dr. --- ---- (Psychiatrist) diagnosed ADHD, Combined type; Depressive Disorder NOS; R/O Oppositional-Defiant Disorder vs. Bipolar Disorder, NOS and Mild Mental

Retardation. Dr. ---- noted that "his concentration was poor and she could not add ten plus ten...He seems to have a great deal of difficulty understanding concepts throughout the evaluation." (Exb. 16, 36 ---- Pg. 3-4).

6. At the hearing, the District suggested that prior evaluators and providers had recommended that Student receive certain interventions, which the Mother did not provide, presumably to the child's detriment (TR III Pg. 346). Mother went through each of the evaluations and noted that all recommendations were followed. For example, Dr. --- ---- recommended that the mother obtain help with decision-making and family therapy, and a referral for the child to Value Options (the Maricopa County RBHA) for psychiatric medication. (Exb. 36 ---- Pg. 4) The mother testified that she did contact Value Options for assistance in August 2001 (TR III Pg. 325). Further, she testified that the child was recently evaluated by a psychiatrist and he was placed on medication (TR III Pg. 354). Dr. --- ---- evaluated the child in December 2000 and recommended certain specific behavioral interventions by the school, a vision assessment and a re-evaluation in 6 months (Exb. 36 ---- Pg. 7 and 8). Mother testified that she did have a vision evaluation and that glasses were not recommended (TR III Pg. 351).

7. This Hearing Officer finds that the mother did follow through on professional recommendations to the best of her ability, and any failure on her part to do so did not contribute significantly to the boy's behavioral difficulties at the current School.

8. At the previous School, Student entered with an IEP for a self-contained class, and he was placed in a self contained room for mildly mentally retarded students serving typically 12 to 15 students at a time with the assistance of an aide. The boy was in this room all day except for some same age "specials and for lunch. The previous Special Education Teacher testified that "he had problems staying on task, finishing his work, but that's about it. Nothing out of the ordinary for my classroom." (TR I Pg. 151). She and the mother were working on the revised IEP, which was due in May 2001. By the end of the school year she suggested that the boy could move to a resource setting, but mother wanted him to stay in self-contained until December 2000, primarily because his academics were not sufficient. The previous teacher felt that the boy could go into a resource setting with more age-appropriate children for socialization, not academics, because "he was feeling more comfortable and confident in socializing with the third graders." (TR I Pg. 156). Had she known that

he would be moving to a new school the next academic year she would not have considered a resource setting - she would have left him in the self-contained setting (TR I Pg. 160) the boy was not allowed to continue in the previous School because he was not homeless (TR I Pg. 163).

9. A journal was maintained while the boy was at the Previous School, which consisted of notes back and forth between teacher and mother (Exb. 51). The previous Teacher provided all of the boy's records to the current School upon request. The mother had not previously requested the return of the journal, and the teacher considered it to be part of the IEP file (TR I Pg. 166-168).

10. It was not improper for the current School to receive the journal or to consider its contents.

11. The Mother accurately reported to the best of her ability the boy's behaviors, progress and status at the Previous School to the School Psychologist at the current School when she took the boy in to be enrolled.

12. The boy's behaviors at the previous School were considerably less disruptive to himself and others than the behaviors regularly displayed at the current School.

IEP COMPLIANCE

13. The IEP developed by the current School District requires 325 minutes weekly of resource support in the classroom and resource room by a special ed teacher. (Exb. 12, 32 Pg. 6) It further requires 2100 minutes weekly with an instructional aide. No supplementary aids or services were required (Pg. 6). Student was to do class work and be tested at the 1st grade level (Pg. 7). He was to be processed through RTC at the 1st grade level. He is to be with students who are non-disabled for 100% of his day excluding discipline procedures and testing accommodations (Pg. 7). The mechanism for informing the parents of the child's progress was listed as "Quarterly reports" (Pg. 9).

14. Student was with the Special Education Teacher her in the resource room daily 45 minutes in the morning and 30 minutes in the afternoon (75 minutes total), and 45 minutes in the morning and 30 minutes in the afternoon in the regular classroom, which totals 150 minutes per day or 750 minutes per week (TR I - Pg. 35-36, 39-40).

15. When the IEP was developed, the Student was provided with

a temporary instructional aide while the School recruited permanent staff for that position. The permanent aide was not yet located by the time Student was withdrawn 25 days later. Because the aide needed a break in the morning, Student was 15 to 20 minutes late to his special class each morning (TR III Pg. 298). This was especially unfortunate, not just because Student missed a significant portion of the special class, but also because it made him feel "different" when he arrived late. This would have been remedied when the permanent aide was hired. In addition, the child had to leave class 30 to 45 minutes early every day because the only available aide had to leave 30 minutes before the end of the day. The mother was aware of the need to go home early and assented to it at the August 30th IEP meeting (TR III Pg 299, 372, 374) but clearly she did not expect it to continue indefinitely. She was not made aware of the need for the aide to take a morning break until after the IEP was signed (TR III Pg. 393).

16. Because the child was enrolled only 25 days after the IEP was signed (August 31 to October 5, 2001) it cannot be concluded that the District was significantly out of compliance with the IEP by not providing a full time instructional aide.

17. At the hearing, Mother requested counseling as an additional service (TR III Pg. 290, 316-318). The School Psychologist disagreed that it would be helpful. On the record before me, this Hearing Officer finds that the evidence does not support one-on-one cognitive-based counseling for a student with the cognitive deficits and focusing difficulties, which this student displays. An IEP team with more information may, however, determine that some form of counseling is appropriate.

WHETHER THE IEP CONTAINS APPROPRIATE POSITIVE BEHAVIORAL REINFORCEMENTS

18. The IEP was developed after the child was in school only 10 days and before the difficult behaviors developed. It contains only a perfunctory few positive interventions, of which positive reinforcements is one, but contains no details (Exb 12 Pg. 8). This is insufficient to describe the range of positive interventions needed to meet this child's special needs as they have developed through the course of his tenure at the School. When a new IEP is developed, it should contain positive behavioral reinforcements specifically applicable to this child's needs and capacities.

WHETHER AN APPROPRIATE BEHAVIORAL PLAN WAS DEVELOPED AND

PROPERLY IMPLEMENTED

19. The IEP does not contain a Behavior Management Plan. The IEP does describe certain behavior problems including that he "...is constantly asking for someone to help him only, and can be very argumentative and zero in one topic and stays with it (as when he is not displaying appropriate behavior)." (Exb 12 Pg. 2) and does describe as a behavioral intervention that Student "will process through the RTC at 1st grade level" (Exb. 12 Pg. 7). The IEP lists a behavioral goal (Exb. 12 Pg 5) and on Pg. 10 the box is checked for a student "whose behavior impedes learning...positive behavioral interventions, strategies, and supports have been considered. Needed see PLEP." The IEP (Exb 12 Pg 8) lists as adaptations certain Positive Interventions but they are the standard list, preprinted on the page and contain no details or other interventions specifically designed for this student - with the exception of the addition of a timer under the assistive technology category - but without any explanation of how the timer is to be used (Exb.12 Pg. 8).

20. The District utilizes a behavior intervention program on a school-wide basis called Responsible Thinking Process (RTP) developed by Ed Ford. It is a process used to discipline misbehavior (TR I Pg. 62). Through this process, if a child is being disruptive in the classroom, he is asked a series of questions starting with: "What are you doing?"; "What are the rules?"; "What happens when you break the rules?"; "Is that what you want to happen?"; "So what are you going to do now?" and "What happens if you disrupt again?". If the child is ready to conform, he stays in the classroom. If he disrupts again, the questions are asked: "What are you doing?" "What did you say would happen the next time that you did that?" and "I see you've chosen to go to the "RTC" which is the Responsible Thinking Classroom. In the RTC there is a certified teacher and an aide, and the child goes into that classroom and develops a plan to help them get back into the regular classroom. The plan would cover what happened and ways the child can deal with that situation the next time so that they won't get sent out of the classroom (TR I Pg. 67). If the child is not yet ready to work on the plan, they can put their head down or work on some other schoolwork for a while (TR I Pg. 60-61). A special needs child may work off grade level by, for example, drawing a picture rather than writing a plan. When the child has developed the plan to the satisfaction of the RTC teacher, he must "negotiate" with the classroom teacher to get the plan accepted before he is readmitted to the regular classroom (TR I Pg. 67).

If the child misbehaves in RTC, the RTC teacher will go through those same rules; and then if the child misbehaves again, he is sent home and the parents are called to come and pick him up (TR I Pg. 69). If the child is sent home, in order to get into school the next day they must attend a meeting with staff and their first step is to go back to the RTC and write the plan. They don't get right back into the regular classroom (TR I Pg. 72). Being sent home during the day is not considered a "suspension" (TR I Pg. 70).

If the RTC isn't working over time, a Student Intervention Team (all of whom are school staff) might meet to come up with a plan for that child (TR I Pg. 64). For a special needs child, an IEP team meeting might be scheduled.

Neither a Student Intervention Team nor an IEP team meeting was scheduled to deal with Student's behavior prior to the October 5th meeting requested by mother (TR I Pg. 68).

21. Student's RTP was modified to a kindergarten-first grade level (TR I Pg. 41).

22. Current Special Education Teacher testified that "for the school" RTC would be the same as the Behavior Management Plan but it could be added to (TR I Pg. 54).

23. A plan was developed by school staff (Exb. 23, 49) and provided to the mother on September 12, 2001 (TR I Pg. 47). The plan, which is 5 pages long, essentially sets out the "classroom rules" (i.e. Keep your body parts to yourself, Listen and follow directions, etc.) and the RTC policy described above in language, which the Student might be better, able to understand. It also describes the boy's "following directions goal" i.e. The aide will give the boy a one or two step direction, repeat the direction and mentally count to 15, then repeat the direction and set the timer for 5 minutes. If he has not followed the direction in 5 minutes, 5 minutes will be taken from his lunch. "If 45 minutes are lost at any time mom is called and [student] does home. Slate is wiped clean and new tally started." (Exb 23 Pg. 3) A chart to monitor the boy's compliance with the classroom rules and a "What If Chart" which sets out positive and negative reinforcements. The mother was not invited to participate in the development of this plan.

24. The School argued that it would not be appropriate to include a specific Behavior Management Plan in the IEP because it should be a more flexible document, in need of frequent modification and adjustment (TR III Pg. 389). Federal law

only requires a formal behavior management plan when a child has been or is about to be suspended for more than 10 days. 34 C.F.R. § 300.520(b)(2).

25. Mother requested a behavior management plan or positive support plan be developed and implemented and very succinctly described the goals for such a plan as being "...to teach appropriate behavior and help the disabled child to identify alternative ways to manage their needs, desires, frustrations, conflicts or problems with a means for the child challenged with behaviors to monitor his progress..." (TR III Pg. 293).

26. This Hearing Officer further finds that a behavior management or intervention plan specific to this child should have been developed when the school staff determined that the student was in need of so much re-direction and was being sent to the RTP room so often that he was not able to learn. The September 12th plan is inadequate to meet these criteria.

THE MOST APPROPRIATE, LEAST RESTRICTIVE EDUCATIONAL PLACEMENT FOR STUDENT

27. Student exhibited numerous behaviors, which caused current School staff concern. He would "leave a supervised area without permission (TR I Pg. 41). He was not able to incorporate the basic behaviors which would allow him to be successful in the regular classroom such as raising his hand appropriately, transitioning from room to room independently, and would not take "no" for an answer to a greater extent than usual in a special education population of the same age and capacity (TR I Pg. 41-44).

28. The instructional aide described one occasion when the student was upset because another student had called him names or teased him. The student "took matters into his own hands and actually chased the [other] student around the library." (TR II Pg. 181). On another day he ran to the boy's bathroom and refused to come out. By the time the aide went in to the bathroom to get him he "had run off and headed for the resource room." (TR II Pg. 183).

29. The Student testified that he ran from school staff to the bathroom "to get time to think and to get pressure off me...and to use the rest room and to think a little bit more and then come out." (TR II Pg. 194).

The boy did not like being made to feel different; doing different tasks than the rest of the class, reading in different books (TR III Pg. 195-196). He felt bad that the

teacher was always writing notes about him (TR III Pg. 198-199). He did not understand why he was not allowed to go to the Cartoon Network on the Internet as a reward for good behavior.

30. Mother described a particular incident during a time when she was observing Student when despite some behavioral disruption the boy did complete the assignment but perhaps to the frustration level of the aide, was not given any positive reinforcement (TR III Pg. 304-305). The Mother's testimony repeatedly points to incidents which the School determined to be disruptive but which might have been avoided or deflected had a different approach been taken (TR III Pg. 304 - 316). Mother acknowledged that she had learned a great deal about behavior management alternatives through her preparation for this hearing (TR III Pg. 314).

31. The Regular Education Teacher testified that she has 26 students in her classroom of whom 6 or 7 may be on IEPs. Two of the students had aides (TR I Pg. 122).

32. The Student's challenges "were more behaviors than academic...things like staying on task and doing whatever it was that had been given to him to do." He might start writing his name get through one or two letters and get distracted. So he needed direction over and over again." (TR I Pg. 115).

33. In a typical regular classroom day there are nine transitions from one activity or site to another. These transitions were particularly difficult for the Student, even with the aide's assistance. It took him much longer to get from place to place, which reduced instructional time (TR I Pg. 122). "Usually he got to maybe the first or second transition before he got to a point where he either bolted from the classroom or the aide had to help him out of the classroom. At least three of the five days I wouldn't see him after the second transition, or I would see him later on the day for a little while and then another transition would be a difficulty and he would be gone for a little while again" (TR I Pg. 123-124). The teacher did try different activities such as more groups, more breaks, and she used the timer. None of these additional interventions worked sufficiently to reduce the number of times he had to leave the classroom (TR I Pg. 126).

34. The boy was sent home from school 3 times for misbehavior. On one additional occasion the mother chose to pick him up from school early (TR III Pg. 385).

35. Student requires an enormous amount of direction and re-direction. He obviously wants to succeed, but cannot do so without constant or almost constant adult supervision. During the demonstration of his skills, which occurred at the hearing, the mother provided learning tools, positive reinforcement and constant direction. He certainly put out his best efforts, and did well at the tasks so directed (TR III Pg. 276-288, Exb B) which demonstrated that he is capable of educational achievement in a very structured setting.

36. The student's current tutor, who is a certified teacher and also his aunt testified that when she works with him she has to constantly remind him of what he is doing and why and redirecting him. With redirection he can stay follow directions (TR I Pg. 77). He does not do well when rushed. He feels like others think he is stupid or crazy. In the regular classroom the boy feels different because he is treated different. In the tutoring setting, which is essentially one-on-one he was able to successfully complete many of the tasks presented (TR I Pg. 99-100, 103).

37. It was the tutor's belief that the boy would be better placed in a one-on-one self-contained classroom until he's up to the standard of his grade level, due to his frustration at not being able to fit in and do what everyone else is doing. Even with an aide, he is frustrated an not doing what the others are doing (TR I Pg. 105).

38. The student testified that he likes the regular classroom at the current school better than the self-contained classroom at the prior school because the teachers are nicer and the kids are more his age and size (TR II Pg. 222). However, he was sad when the other kids in the class were doing different work than he. He felt that he would do better in a class where all the kids were his age and doing the same work (TR II Pg. 226).

39. At the commencement of the hearing, the School Psychologist stated that the District believed that the most appropriate, least restrictive placement for Student would be in "a self-contained classroom at ----- Elementary School with students the same age and at the same ability level..."(TR I Pg. 14). The Mother testified that she wished the boy to "remain in the general curriculum resource setting." (TR I Pg. 18).

40. At the conclusion of the hearing the District argued that the most appropriate placement was a self-contained setting within the District (TR III Pg. 386).

41. At the hearing, Mother requested a functional assessment, a behavioral management plan or a positive support plan be implemented. This Hearing Officer agrees that a functional assessment would be a very useful tool to determine the student's needs and specifically finds that a functional assessment shall be completed as a part of the next IEP planning process. This Hearing Officer further finds that Mother must be involved in the assessment process.

42. Toward the conclusion of the hearing, the mother stated that the proper placement decision would be difficult to make without sufficient information, including a functional assessment "but ruling out the regular and general curriculum as a proper place, I don't feel we have sufficient information." (TR III Pg. 391). Mother's concern that the proper educational placement cannot be determined based on the information presently available may very well be correct. However, when Student is returned to school, he must be placed into a specific setting.

This Hearing Officer concludes that, at the present time, the most appropriate least restrictive placement for Student would be a self-contained setting.

43. After the conclusion of the hearing, in response to an inquiry from the Hearing Officer about the time required to review the transcripts, the mother telefaxed a note to the Hearing Officer through the District office approving the extension, and including a paragraph, which stated:

In addition to the above matter, (a few minutes after hearing) I was asked several questions in relationship to where [student] would attend school by [District Representative]. It then occurred to me, when would be addressed (sic) regarding my letter? ...

This Hearing Officer tried to set up a conference call with both parties to determine what "letter" mother was referring to. Numerous messages were exchanged, and it was ultimately determined that mother was referring to the letter of October 8, 2001 wherein Mother stated that she requested an IEP meeting "to inform Public School of my intention to register [Student] into a Private School. Informed that withdrawal process to put [Student] at private school does not warrant a mtg. Public School I feel failed to provide FAPE as well as not complying with Procedural Safeguards." [Exhibit 1]

44. At no time during the hearing was placement into a private

educational facility mentioned. No testimony was presented to substantiate that a private school placement would be appropriate. No basis has been presented upon which this Hearing Officer would exercise the discretion to order the LEA to reimburse the Mother for the cost of a private school placement.

WHETHER A NEW PLACEMENT WAS IMPROPERLY PROPOSED AT OCTOBER 5, 2001 IEP MEETING?

45. On October 5, 2001 an IEP meeting was held at Mother's request. The request had been made on or about September 28, 2001 as evidenced by the Prior Written Notice and Parent Conference Notification. The Prior Written Notice lists "amend/change [Student's] IEP under "Description of the action Proposed or Refused" and "Parent request" under "Explanation of why the District Proposes or Declines to take this action." (Exb. 7, 31).

46. The current Special Education Teacher to whom Mother made the request for the meeting testified that the Mother was requesting the meeting "to go over the behavior plan." (TR I Pg. 36).

47. The October 5th IEP team meeting was attended by the Mother, the School Psychologist, current Special Education Teacher, Speech Therapist, Principal and Regular Education Teacher and by the Special Education Teacher from the previous School (Exb 7, 31). Someone brought to the meeting the journal (Exb. 51) which was discussed in Finding 9, *supra*, which was not listed on the Notice, and which the mother believed to be her private property.

48. The Conference Report prepared by Speech Therapist, describes the purpose of the meeting as "Discussion of appropriate setting in which to implement the IEP." (Exb. 7, 31). The Therapist testified that the mother ran the meeting "...asking for changes to the way his discipline was being administered, not wanting him sent home and so forth..." (TR II Pg. 228). The meeting had started before the mother arrived, and "got adversarial very quickly (TR II Pg. 242). No specific placement alternatives were proposed (TR II Pg. 245).

49. The School Psychologist testified that she opened the meeting with the statement that the mother had requested the meeting and it was "Her show" (TR III Pg. 363). It was acknowledged that the meeting started before the mother's arrival.

50. The Mother described the meeting as commencing with the Special Education Teacher opening the meeting with the statement that "...we are here to discuss the setting in which to implement [Student's] IEP. And immediately I want on the defensive, to be honest, because I felt that I was going into a meeting to discuss why he had to go home early." (TR III Pg. 320). According to Mother, it was then acknowledged that going home early was an issue, and other IEP members added the concern that some of Student's behaviors constituted a safety risk. (TR III Pg. 322). The meeting began to deteriorate when it was suggested that some of the boy's more difficult behaviors had been evidenced at the prior school, to which the Mother disagreed, and she expressed concern that the source of such mis-information was her private journal (TR III Pg. 323). The School Psychologist recommended a self-contained placement and Mother reacted negatively, feeling that her child was not being given a fair chance to succeed in a regular classroom (TR III Pg. 326). Thereafter, the meeting deteriorated into what Mother termed a "cat fight" with accusations of "humiliation", staff incompetence and mismanagement. Mediation was discussed as a dispute resolution mechanism and rejected (Exb. 7, 31). Mother acknowledged that there was no new IEP was presented to her at that meeting, and no paperwork was presented requesting a change of placement (TR III Pg. 359-360).

51. The mother contributed to, but was not solely responsible for, the deterioration of the October 5th meeting.

52. School staff, who are professional educators, contributed to the deterioration of the October 5th meeting by not focusing first on the Mother's expressed concerns about the lack of a behavior plan and alternatives to removing the child from the regular classroom.

53. This Hearing Officer finds that the School did not improperly propose a change of educational placement in violation of 34 C.F.R. § 300.503(a)(1)(b).

54. On October 8, 2001 the Mother notified the District in writing that she was withdrawing Student from the District and placing him into a private school, and she filed a written request for due process based on her disagreement with the change of placement proposed at Oct. 5, 2001 IEP mtg." (Exb 1).

55. The withdrawal of the child from School, although certainly within the mother's right, contributed to the

School's inability of effectively evaluate the child and determine an intervention plan.

III. APPLICABLE LAW

20 U.S.C. § 1414(f) states:

Each local educational agency of State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

20 U.S.C. § 1414(d)(1)(B) and 34 C.F.R. § 300.344 IEP team require the public agency to ensure that the IEP team for each child with a disability includes the parents of the child.

34 C.F.R. § 300.345 Parent participation states:

(a) Public agency responsibility - general. Each public agency shall take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting including -

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend ...

(b) Information provided to parents.

(1) The notice required ... must

(i) Indicate the purpose, time, and location of the meeting and who will be in attendance; and

(ii) Inform the parents of the provisions ... relating to the participation of other individuals on the IEP team ...

34 C.F.R. § 300.503 Prior notice by the public agency; content of notice states:

(a) Notice

(1) Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency-

(i) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child ...

34 C.F.R. § 300.346 Development, review and revision of IEP states:

(a) Development of IEP...

(2) Consideration of special factors. The IEP team also shall-

(i) in the case of a child whose behavior impedes his or her learning or that of others, consider, if appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior;

(d) Requirement with respect to regular education teacher. The regular education teacher of a child with a disability, as a member of the IEP team, must, to the extent appropriate, participate in the development, review, and revision of the child's IEP, including assisting in the determination of-

(1) Appropriate positive behavioral interventions and strategies for the child, and

(2) Supplementary aids and services, program modifications or supports for school personnel that will be provided for the child...

34 C.F.R. § 300.347 Content of IEP states:

(a) General. The IEP for each child with a disability must include-

(4) A statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modification or supports for school personnel that will be provided for the child.

CHILDREN WITH DISABILITIES ENROLLED BY THEIR PARENTS IN PRIVATE SCHOOLS WHEN FAPE IS AN ISSUE.

34 C.F.R. § 300.403 Placement of children by parents if FAPE is at issue states:

(a) General. This part does not require an LEA to pay for the cost of education of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. (c) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private school with the consent of or referral by the public agency a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and the private placement is appropriate. (*emphasis added*)

An award of reimbursement for a unilateral private school

placement is discretionary. The parent must not only show that the District's plan was deficient and that the private placement was appropriate "but also must persuade the [tribunal] to exercise its discretion to provide reimbursement." *Linda W. V. Indiana Department of Education*, 32 IDEALR 66 (U.S. Court of Appeals, 7th Cir. (1999)).

"Least restrictive environment" is defined by **20 U.S.C. § 1412(a)(5)** as follows:

(A) IN GENERAL. - To the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. See also: ACC R7-2-401 G.

34 C.F.R. § 300.552 Placements states:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency shall ensure that-

(a) The placement decision-

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum.

Appendix A to Part 300 - Notice of Interpretation.

I. Involvement and Progress of Each Child with a Disability in the General Curriculum

While the Act and regulations recognize that IEP teams must make individualized decisions about the special education and related services, and supplementary aids and services, provided to each child with a disability, they are driven by IDEA's strong preference that, to the maximum extent appropriate, children with disabilities be educated in regular classes with their nondisabled peers and appropriate supplementary aids and services. *Fed. Reg. v. 64 no. 48 March 12, 1999 Pg. 12470.*

The LEA has the burden of proving compliance with the IDEA including the appropriateness of its evaluation and its proposed placement. Seattle School Dist. No.1 v. B.S. 82 F.3d 1493, (9th Cir. 1996).

The only direct reference in the federal regulations requiring the District to develop a behavioral intervention plan with "appropriate behavioral interventions" is **34 C.F.R. § 300.520 (b)(2)** when a child has been or is about to be suspended for more than 10 days or commencing a removal that constitutes a change of placement. This does not apply here. Not every procedural violation is sufficient to support a finding that the child in question was denied a FAPE. If it interferes with the child's right to receive services. Procedural inadequacies that result in the loss of educational opportunity or cause the deprivation of educational benefits will constitute a denial of FAPE. *Amanda J. v. Clark County School District*, no. 99-17157 (U.S. Court of Appeals, 9th Cir. 2001).

The parents however must cooperate with the process including allowing the school district a reasonable opportunity to evaluate the child. *Patricia P. V. Board of Ed. of Oak Park and River Forest High School District*, 3412 IDEALR 211 (U.S. Court of Appeals, 7th Cir. 2000).

IV. CONCLUSIONS

1. The IEP developed on August 30, 2001 did not contain detailed or specific positive reinforcements designed to meet this Student's needs. However, Student was new to the School, and the behavioral problems were not yet evident in the quantity or quality, which cause the eventual educational disruption. Therefore, the student was not denied a FAPE because of this deficiency.

2. A functional assessment and a detailed, student specific, behavioral intervention plan are needed for this child to attain educational benefit. The mother must be fully involved in the development of these tools.

3. Although the decision to place the child into a regular classroom appeared reasonable and appropriate at the time the placement was made, it was singularly unsuccessful. This was not the child's fault. However, the minimal amount of time he was, in fact, being educated in that setting due to his disruptive behaviors, the lack of educational progress, the

boy's own frustration with being "different from" his regular classroom peers, and the amount of time he has now spent out of any formal class setting all dictate that, at this time, the least restrictive educational setting for this Student would be a self-contained setting. A goal of the next IEP should be to advance the student to a regular classroom as quickly as possible.

4. There is no indication that the District cannot provide an appropriate placement or that a private placement would be appropriate for this child.

5. The August 30, 2001 IEP was not fully implemented due to the unavailability of a full time aide for the student, which caused him to miss some instructional and some "special" time each day. However, he was only in school for 25 days after the IEP was signed. There was no evidence that the School was not attempting to provide an appropriate instructional aide. Therefore, as of the time when he was removed, he was not being denied a FAPE because of the deficiency.

6. The October 5, 2001 IEP meeting was requested by the mother. Although early in the meeting school staff mentioned the possibility of returning the boy to a self-contained setting as a possible resolution to the behavioral problems observed by all participants, there is no evidence that the meeting was called for that purpose, or that staff had such a radical modification to the existing IEP ready for presentation. The District was prepared to continue the boy in the placement designated in the August IEP. Therefore, a change of placement was not improperly proposed at the IEP meeting without proper prior notice.

7. The mother came to the meeting prepared to, and did, voice the concerns regarding the "intervention plan" being inappropriate, the boy's behaviors being triggered, the support staff lacking training and staff overreacting to his behaviors. The School staff failed to give the mother's concerns proper consideration. Unfortunately, the mother's reaction to the suggestion of a self-contained setting and to the presentation of materials from the prior school which she did not believe the current school should have, contributed to the dissolution of the meeting without reaching any positive agreement.

8. The mother did not fail to follow through on prior professional recommendations for services for the student.

9. Unless an IEP team specifically recommends it, one on one

cognitive counseling is not a necessary educational service for this student.

V. DECISION/ORDER

1. Upon the child's return to the District, he shall be placed into an appropriate self-contained setting.
2. Upon the child's return to the District, the appropriate team of staff and parent shall be convened to develop a behavioral intervention plan. This plan may be incorporated into a new IEP or kept separate, but it will be specific to meet the needs of this child
3. Upon the child's return to the District, a functional assessment shall be performed. The mother shall be given the opportunity to provide input to the assessment.
4. Upon completion of the functional assessment, but not later than 2 weeks after the child's return, an IEP team meeting shall be convened to determine what modifications are need to the existing IEP to achieve the child's return to a regular or resource classroom as soon as possible.

VI. APPEAL PROCEDURE

Either party has the right to appeal this Decision to the Office of Administrative Hearings within thirty five (35) calendar days after receipt of this Decision. (ACC R7-2-405(H)(5) Requests for appeal must be submitted in writing to the Dispute Resolution Coordinator, Arizona Department of Education, 1535 West Jefferson, Phoenix, Arizona 85007 (AAC R7-2-405(J)(1)

DATED this 22-day of January 2002.

C. Eileen Bond
Due Process Hearing Officer

Copy of this Decision mailed by
regular and certified mail January 24, 2001 to:

--- ----

Alice Simmerman
Special Education Director
1226 W. Osborn Road
Phoenix, Arizona 85301

By regular mail to:

Arizona Department of Education
Exceptional Student Services
1535 West Jefferson
Phoenix, Arizona 85007

By: _____

**MATTER OF --- ----, by --- ---- and
OSBORN ELEMENTARY SCHOOL DISTRICT**

EXHIBITS DOCUMENT #	IDENTIFICATION	ADMITTED
1 HO	Request for Due Process, dated 10-8-01	12-10-01
2 HO	Notice of appointment of Due Process Hearing Officer, dated 10-29-01	12-10-01
3 HO	Letter setting Pre-Hearing Conference, dated 11-1-01	12-10-01
4 HO	Letter setting Hearing dated 11-8 -01	12-10-01
5 HO	Letter re-setting Hearing dated 11-12-01	12-10-01
6 DIST	Conference Report Osborn 11-6-01+ 11-7-01 letter, + 2 notes from Ms. Smith dated 10-8-01	12-10-01
7 DIST	Conference Report Osborn 10-5-01+ Prior Written Notice of 9-28-01	12-10-01

8 DIST	Conference Report Osborn 8-30-01	12-10-01
9 DIST	Mild Mental Retardation Determination of Eligibility 8-30-01	12-10-01
10 DIST	Prior Written Notice 8-30-01	12-10-01
11 DIST	Consent for Initial Educational Placement 8-30-01	12-10-01
12 DIST	IEP Osborn 8-30-01 *** same as 32 Child's 4	12-10-01
13 DIST	Psychoeducational evaluation addendum 12-13-00 by Carrie Stanley, School Psychologist, Dr. Alice Simmerman, Supervising School Psychologist	12-10-01
14 DIST	Parent Conference Notification 8-19-01	12-10-01
15 DIST	Prior Written Notice 8-19-01	12-10-01
16 DIST	Psychiatric Evaluation 7-25-01 by --- --- -, D.O. *** Same as 36 Child's 8	12-10-01
17 DIST	Progress Report on Annual goals (Lisa Hestand 3 pages)	12-10-01
18 DIST	IEP ---- 5-29-01	12-10-01
19 DIST	Kid Assist Psychoeducational Evaluation 12-11 thru 13-00 by --- ----, Ph.D. *** Same as 36 Child's 8	12-10-01
20 DIST	Healthsouth Speech/Language Evaluation 12-13-00 by --- ----, M.S. CCCS *** Same as 36 Child's 8	12-10-01
21 DIST	Student Progress Report 10-1-01 Ms. ---- (----)	12-10-01
22 DIST	RTC referral 8-28-01 Ms. ----	12-10-01
23 DIST	---- Individual Behavior Plan 9-6-01 to 9-12-01 (6 pages)	12-10-01

24 DIST	Classroom Teacher Notes 8-21-01 thru 10-4-01	12-10-01
25 DIST	Home School Notebook 8-21-01 thru ???	12-10-01
26 DIST	Ms. ---- Notebook 8-23-01 thru 9-20-01	12-10-01
27 DIST	Journal - Mrs. ----/Mrs. ---- 9-7-01 thru 10-5-01	12-10-01
28 DIST	Work Samples	12-10-01
29 CHILD 1	AD/HD National Information Center for Children and Youth with Disabilities	12-10-01
30 CHILD 2	Univ. Of Kansas Families and Disability Newsletter "Positive Behavioral Support"	12-10-01
31 CHILD 3	Conference Report Osborn 10-5-01+ Parent Conference Notification 9-28-01 + Prior Written Notice 9-28-01 + Conference Report 8-30-01 + Prior Written Notice 8-19-01 + consent for Initial Educational Placement + MMR Determination 8-30-01 + Records Destruction Information 8-30-01 + Parental Consent for Release 8-30-01 + Prior Written Notice 8-30-01	12-10-01
32 CHILD 4	IEP Osborn 8-30-01 *** same as 12	12-10-01
33 CHILD 5	Examples of ---'s work at ----	12-10-01
34 CHILD 6	Example of Reading level at ----	12-10-01
35 CHILD 7	Southwest Behavioral Health cover letter 11-26-01 + Treatment Plan + progress notes	12-10-01
36 CHILD 8	Psychiatric Evaluation by --- ----, D.O. 7-25-01 *** same as 16 Kid Assist Psychoeducational Evaluation by --- ----, PhD 12/11, 13/00 *** same as 19 Healthsouth Speech/Language Evaluation by --- ----, 12-12-00 *** same as 20	12-10-01

37 CHILD 8	ADES Disability Determination Service, Psychological evaluation by --- ---- Ph.D. 3-30-00	12-10-01
38 CHILD 9	---- Discipline Rules: + Behavioral Plan	12-10-01
39 CHILD 10	RTC referrals from ---- 8-28-01, 8-31-01, 9-5-01, 9-11-01, 9-28-01, 10-1-01	12-10-01
40 CHILD 11	Personal journal notes from ---- for mom	12-10-01
41 CHILD 12	IEP 5-01 ---- *** same as 18 Progress report on annual goals *** same as 17 ---- report card 6-5-01 Computer Lab progress report 3-12-01 Prior written Notice 5-21-01 ---- enrollment form 2-7-01 speech/language screening results 3-19-01 records releases	12-10-01
42 CHILD 13	Personal journal notes from ---- 3-27-01 thru 6-8-01	12-10-01
43 CHILD 14	Examples of work from ----	12-10-01
44 CHILD 15	---- mid-term progress report 10-2-01	12-10-01
45 CHILD 16	Math paper under tutor supv. 12-2-01	12-10-01
46 CHILD 17	NO EXHIBIT	
47 CHILD 18	Ms. ---- NOTEBOOK 8-23 THRU 9-20-01 *** same as 26	12-10-01
48 CHILD 19	Journal Ms. ----/Ms. ---- 9-7-01 thru 10- 3-01 *** same as 27	12-10-01
49 CHILD 20	---- Individual Behavior Plan 9-6-01 to 9-12-01 (6 pages) *** same as 23	12-10-01

50 CHILD 21	Observations by school staff at ---- 10-4-01	12-10-01
51 CHILD 22	---- file	12-10-01
52 CHILD 23	Additional ---- file	12-10-01
53 CHILD 24	Individual assessments 8-29-01	12-10-01
54 CHILD 25	Letter requesting due process 10-8-01 *** same as 1 Letter to ADOE 10-10-01 Added 10-12-01 note 11-7-01 letter to ADOE 10-12-01 letter to Ms. ---- 10-12-01 letter to ---- principle 10-16-01 letter to Bond re extending hearing 11-8-01 letter to Simmerman 11-19-01	12-10-01
55 CHILD	10-8-01 Letter from --- ---- to Ms. ---- requesting meeting to inform school of intention to register --- ---- in to private school. Official Notice of Pupil Withdrawal letter to Ms. ---- ---- from --- ---- 11-29-01 Notice of workshop Osborn School district Classified vacancies as of 10-30-01	12-10-01
TR I A	HEARING OFFICER EXHIBIT LIST	
TR III B	Work sheet for ---'s demonstration at hearing	1-7-02
TR III C	Functional assessment form filled in by mother	Offered 1-7-02 Not Admitted